

STATE OF NEW MEXICO
COUNTY OF CURRY
NINTH JUDICIAL DISTRICT COURT

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KEN URBAN; and
JANELL URBAN; HARTFORD CASUALTY
INSURANCE COMPANY;

Plaintiffs

D-905-cv-2012-00562

vs.

ENVIRO-SAFE REFRIGERANT, INC.;
CONCORD CHEMICAL, INC.; AEROPRES CORPORATION,
AND COX REFRIGERATION & ELECTRIC, INC.

Defendants

FIRST AMENDED COMPLAINT

COME NOW the Plaintiffs Ken Urban and Janell Urban, by and through their attorneys Keleher & McLeod, P.A. and Hartford Casualty Insurance Company, by and through its attorneys, Bauman Loewe Witt & Maxwell, PLLC (Christopher Brennan), and for their Complaint against Enviro-Safe Refrigerants, Inc. ("Enviro-Safe"), Concord Chemical, Inc. ("Concord Chemical"), Aeropres Corporation ("Aeropres") and Cox Refrigeration & Electric, Inc. state:

Jurisdiction and Venue

1. Ken Urban, is a resident of Curry County, New Mexico.
2. Janell Urban is a resident of Curry County, New Mexico and is the wife of Ken Urban.
3. Ken and Janell Urban operated a commercial ice business, which was a d/b/a, H2O Express, in Clovis, Curry County, New Mexico.
4. Hartford Casualty Insurance Company ("Hartford") is an insurance company incorporated or organized under the laws of a foreign jurisdiction. At all relevant times,

Hartford was authorized to conduct and transact business as an insurance company in the State of New Mexico.

5. At all relevant times, Hartford provided insurance covering property and other interests owned by H2O Express in Clovis, Curry County, New Mexico. Hartford did not provide insurance covering personal injury claims.
6. Enviro-Safe is an Illinois corporation, doing business throughout the United States, and specifically in New Mexico. Enviro-Safe bottled and sold to Concord Chemical that certain refrigerant, which was later sold to Ken Urban under the Maxi-Frig brand, and which exploded causing injury and damage to Plaintiffs.
7. Enviro-Safe knew, or should have known, that its 22-A refrigerant was sold and / or otherwise distributed to be used in New Mexico.
8. Concord Chemical is a Mississippi corporation, doing business throughout the United States, and specifically in New Mexico. Concord Chemical is the holder of the trademark for "Maxi-Frig". Concord Chemical is in the business of supplying refrigerant products, including the refrigerant which it sells under the brand name "Maxi-Frig Mx-22A". Concord Chemical solicited business directly from the Plaintiffs and knew that its Maxi-Frig Mx-22A was sold and /or distributed to be used in New Mexico.
9. Cox Refrigeration & Electric, Inc. is a New Mexico corporation, doing business in Clovis, New Mexico.
10. Aeropres is a Louisiana corporation, doing business throughout the United States, and specifically in New Mexico. Aeropres manufactured the refrigerant that was bottled by Enviro-Safe, and ultimately sold to Ken Urban. Aeropres knew, or should have known that the refrigerant it manufactured was sold and / or distributed to be used in New

Mexico.

11. This action arises out of an explosion of the Maxi-Fridg Mx-22A refrigerant which seriously injured Ken Urban, destroyed the business at H2O Express, and caused losses and damages to the Plaintiffs.
12. The Court has jurisdiction over the parties and subject matter of this action, and venue is proper in this District.

GENERAL FACTUAL ALLEGATIONS

13. On or about January 5, 2012 Cox Refrigeration serviced one of the commercial ice machines (the "Ice Machine") at H2O Express, which service included repair of a capillary tube, replacement of a water regulating valve and filter, recharge of the system, leak check of the system and addition of R-22 refrigerant.
14. Mr. Urban utilized R-22 refrigerant (freon) as the refrigerant in his business.
15. In or around February 2012, Mr. Urban received an advertisement from Concord Chemical, sent by mail to H2O Express in Clovis, New Mexico, for Maxi-Fridg 22A. Concord advertised the R22A refrigerant as an inexpensive "drop in refrigerant" replacement for the R-22 refrigerant Mr. Urban was currently using.
16. In or around February 2012, Mr. Urban purchased Maxi-Fridg Mx-22A from Concord Chemical.
17. A license was required for adding R-22 refrigerant to the ice-machine, but the Maxi-Fridg Mx-22A required no such licensing.
18. On March 3, 2012 Ken Urban was adding the refrigerant Maxi-Fridg Mx-22A to the Ice Machine.
19. Mr. Urban had not used Maxi-Fridge Mx-22A before, but had been assured by an

employee at Concord Chemical that he could use it in place of the R22 Freon refrigerant, and that he could add it himself to his commercial ice machine.

20. Mr. Urban had owned and maintained the subject Ice Machine since 2004.

21. Mr. Urban added approximately 3 forty pound cylinders of Maxi-Fridg Mx-22A to the Ice Machine, but could not get it to start.

22. After being unable to start the Ice Machine, at approximately 6:30 p.m., Mr. Urban began shutting down the business for the night.

23. As part of the shut down process, Mr. Urban unplugged a fan in an adjoining room.

When he pulled the plug from the wall, the room exploded. Mr. Urban threw his hands in front of his face.

24. Mr. Urban landed on the floor of the business, with the roof of the walk-in cooler and other ice machines on top of him, pinning and trapping him. Mr. Urban's neighbor rushed in and pulled him out of the business.

25. The Clovis Police and Fire Departments responded to the scene and transported Mr. Urban to Plains Regional Medical Center hospital, where he was airlifted to University Medical Center in Lubbock, Texas with severe burns.

26. Ken Urban's mother, Mary Nell Urban, who was at the business at the time of the explosion, called Janell Urban and told her that her husband had been severely burned.

27. Ken Urban was taken via helicopter to University Hospital in Lubbock, Texas.

28. The fire at H2O Express was extinguished by the Clovis Fire Department.

29. The Urban's business, H2O Express, was destroyed in the explosion.

30. Upon information and belief, the explosion was caused by a leak of the Maxi-Fridg Mx-22A refrigerant from the Ice Machine.

31. As a result of the explosion, H2O Express presented claims to Hartford for benefits under an insurance policy. Hartford made payments to or on behalf of its insured, and continues to do so, for property damages and related expenses caused by the explosion.
32. Hartford's insurance policy to H2O Express provided, in pertinent part, that in the event of an insured loss, Hartford would be subrogated to any rights that H2O Express might have against a third party who is responsible for that loss to the extent of their payments. In addition to contractual subrogation rights, Plaintiff has rights pursuant to equitable subrogation.
33. As a result of the roof collapse, and providing coverage under the Policy, Hartford incurred money damages when it compensated or reimbursed and as it is continuing to compensate or reimburse its insured in amounts to be proven at trial.
34. Hartford compensated H2O Express in part for the same loss for which the defendants are liable.
35. The insured loss was one for which Hartford was not primarily liable.
36. Hartford has paid the claim of its insured to protect its own interest and not as a volunteer.
37. H2O Express has an existing, assignable cause of action against the defendants for which the Plaintiffs, Ken and Janell Urban, could have asserted for their own benefit had they not been compensated for their loss by the Hartford.
38. Hartford has suffered damages caused by the act or omission upon which the liability of the defendants depends.
39. Justice requires that the loss suffered by Hartford be entirely shifted from the insurer to the defendants, whose equitable position is inferior to that of the Hartford.

COUNT I
**STRICT LIABILITY FOR DEFECTIVE DESIGN AND MANUFACTURE
AGAINST ENVIRO-SAFE, CONCORD CHEMICAL, AND AEROPRES**

40. Plaintiffs incorporate Paragraphs 1-39 above, as though fully set forth herein.
41. Aeropres sold the refrigerant to Enviro-Safe, who then sold it to Concord, who ultimately sold it as Maxi-Fridg Mx-22A. Upon information and belief, Maxi-Fridg Mx-22A is a highly flammable product which consists of, or has the major characteristics of, propane.
42. Mercaptan is an additive that is typically added to propane as a leak protection safety feature.
43. Enviro-Safe bottled and sold the refrigerant Maxi-Fridg Mx-22A to Concord Chemical.
44. Maxi-Fridge Mx-22A contained no mercaptan or distinctive odor that would serve as a warning of a leak.
45. This failure to add the standard odor for propane to the Maxi-Frig Mx-22A refrigerant rendered the refrigerant defective and unreasonably dangerous. It would have been feasible to employ the standard and expected safety odor feature of mercaptan as a warning of a leak of the refrigerant.
46. This failure to provide the standard odor warning for a leak negated Mr. Urban's ability to detect one, and proximately caused the explosion and resultant personal injury and property damage.
47. As the supplier of the Maxi-Fridg Mx-22A, Aeropres is liable under New Mexico law for Strict Products Liability for defective design and manufacture.
48. As a bottler and supplier of the Maxi-Fridg Mx-22A, Enviro-Safe is also liable under New Mexico law for Strict Products Liability for defective design and manufacture.
49. As a supplier of Maxi-Fridg Mx-22A, Concord Chemical is also liable under New

Mexico law for Strict Products Liability for defective design and manufacture.

50. Upon information and belief, the condition of the Maxi-Fridge Mx-22A was not substantially changed from the time that Aeropres, Enviro-Safe, and Concord Chemical placed it in the market.
51. The Maxi-Fridge Mx-22A was being used in an appropriate manner and in a way that Aeropres, Enviro-Safe and Concord Chemical intended for it to be used.
52. The personal injuries and property damage to the Urbans and their business, H2O Express, were proximately caused by the condition of Maxi-Fridge Mx-22A, namely, defects in the design and manufacture of the product, and failure to adequately warn users of the product of the unreasonable risk of injury that it posed.
53. Therefore, Defendants Aeropres, Enviro-Safe and Concord Chemical are liable to the Urbans.

WHEREFORE, Plaintiffs pray for damages in amounts to be determined at trial:

- a. for lost earnings and capacity for future earnings;
- b. for pain and suffering;
- c. for the loss of enjoyment of life;
- d. expenses for past and future medical care;
- e. temporary and permanent physical impairment;
- f. permanent disfigurement;
- g. lost household services;
- h. property damage;
- i. costs of suit;
- j. pre-judgment and post-judgment interest; and

k. such other and further damages as may be permitted by law;

COUNT II
NEGLIGENCE OF COX REFRIGERATION

54. Plaintiffs incorporate by this reference the allegations contained in Paragraphs 1 through 53, above, as though fully set forth herein.

55. Defendant Cox Refrigeration had a duty to use ordinary care to repair and check for leaks in the Ice Machine.

56. It was reasonably foreseeable to Defendant Cox Refrigeration that if the Ice Machine was leaking, refrigerant could escape from it.

57. Upon information and belief, the Ice Machine did leak and the Maxi-Fridge R-22A refrigerant escaped and exploded, causing injury and damages to Plaintiffs.

58. In failing to exercise ordinary care in detecting leaks in the Ice Machine, Cox Refrigerant breached its duty to Mr. Urban.

59. The failure of Cox Refrigeration to adequately detect leaks in the Ice Machine proximately caused the injuries to the Plaintiffs, and these are not the kind of injuries which would ordinarily occur in the absence of the negligence of an entity so charged with responsibility.

60. Therefore, Cox Refrigeration is liable to the Urbans for negligence.

WHEREFORE, the Plaintiffs pray for damages in amounts to be determined at trial:

- a. for lost earnings and capacity for future earnings;
- b. for pain and suffering;
- c. for the loss of enjoyment of life;
- d. expenses for past and future medical care;
- e. temporary and permanent physical impairment;

- f. permanent disfigurement;
- g. lost household services;
- h. property damage;
- i. costs of suit;
- j. pre-judgment and post-judgment interest; and
- k. such other and further damages as may be permitted by law;

COUNT III

NEGLIGENCE OF AEROPRES, ENVIRO-SAFE AND CONCORD CHEMICAL

61. Plaintiffs incorporate by this reference the allegations contained in Paragraphs 1 through 60, above, as though fully set forth herein.
62. Defendant Aeropres had a duty to use ordinary care to avoid foreseeable risk of injury caused by a condition of its product.
63. Upon information and belief, Aeropres knew that its product was used as a refrigerant.
64. Aeropres' product was ultimately sold as Maxi-Fridg R-22A refrigerant, which is in essence, a propane product that fails to contain proper odorant to warn of a leak of the product.
65. Further, Maxi-Fridg R-22A refrigerant fails to contain adequate warnings or safeguards to protect users from explosions when using its product.
66. Aeropres had a duty to use ordinary care to avoid foreseeable risk of injury caused by a condition of its product.
67. Enviro-Safe bottled the Maxi-Fridg R22-A refrigerant specifically for Concord Chemical, which sold the product under its "Maxi-Fridg" label.
68. Enviro-Safe failed to add proper odorant to warn of a leak of the Maxi-Fridg R-22A refrigerant and sold it as a "drop in" replacement for R22 Freon.

69. Enviro-Safe further failed to provide adequate warnings or safeguards to protect consumers from explosions when using Maxi-Fridg R-22A refrigerant.
70. Enviro-Safe had a duty to use ordinary care to avoid foreseeable risk of injury caused by a condition of its product.
71. Concord Chemical, which sold the product under its "Maxi-Fridg" label, failed to add proper odorant to the Maxi-Fridg R22-A refrigerant.
72. Concord Chemical failed to provide adequate warnings or safeguards to protect users from explosion when using its product and sold it as a "drop in" replacement for R22 Freon.
73. It was reasonably foreseeable to Defendants Aeropres, Enviro-Safe and Concord Chemical that if there was a leak of the Maxi-Fridge R-22A refrigerant, that such leak would be undetectable by the user.
74. It was also reasonably foreseeable to Defendants Aeropres, Enviro-Safe and Concord Chemical that if there was a leak of the Maxi-Fridge R-22A refrigerant, such leak could cause an explosion.
75. In failing to design and manufacture the Maxi-Fridge R-22A refrigerant in a manner consistent with ordinary care and reasonable standards in the industry, Aeropres breached its duties to the Plaintiffs.
76. As the designer and manufacturer of the Maxi-Fridge R-22A refrigerant, Aeropres had responsibility to manage and control the production of same, and the events that proximately caused the injuries to the Plaintiffs are not of the kind which would ordinarily occur in the absence of the negligence of an entity so charged with responsibility.

77. As a bottler and supplier of the Maxi-Fridg R-22A refrigerant, Enviro-Safe had responsibility to manage and control the distribution of same, and the events that proximately caused the injuries to the Plaintiffs are not of the kind which would ordinarily occur in the absence of the negligence of an entity so charged with responsibility.
78. As supplier of the Maxi-Fridg R-22A refrigerant, Concord Chemical had responsibility to manage and control the distribution of same, and the events that proximately caused the injuries to the Plaintiffs are not of the kind which would ordinarily occur in the absence of the negligence of an entity so charged with responsibility.
79. The negligent design, manufacture and supply of the Maxi-Fridge R-22A refrigerant were the proximate causes of the injuries and property damage suffered by Ken and Janell Urban.
80. Therefore, Aeropres, Enviro-Safe and Concord Chemical are liable to Plaintiffs for negligence.

WHEREFORE, the Plaintiffs pray for damages in amounts to be determined at trial:

- a. for lost earnings and capacity for future earnings;
- b. for pain and suffering;
- c. for the loss of enjoyment of life;
- d. expenses for past and future medical care;
- e. temporary and permanent physical impairment;
- f. permanent disfigurement;
- g. lost household services;
- h. property damage;

- i. costs of suit;
- j. pre-judgment and post-judgment interest; and
- k. such other and further damages as may be permitted by law;

COUNT IV
FAILURE TO WARN OR TO PROVIDE DIRECTIONS FOR USE

81. Plaintiffs incorporate by this reference the allegations contained in Paragraphs 1 through 80, above, as though fully set forth herein.
82. Defendants Aeropres, Enviro-Safe and Concord Chemical failed to warn about the danger that the Maxi-Fridg R-22A refrigerant was essentially propane and thus, highly explosive, and failed to provide adequate directions on the use of the Maxi-Fridg R-22A refrigerant to prevent such an occurrence.
83. Defendants Aeropres, Enviro-Safe and Concord Chemical failed to utilize the customary and commonly recognized scent additive, mercaptan, which is designed to warn and alert the user of a dangerous, indeed life-threatening, propane leak.
84. Defendants Aeropres, Enviro-Safe and Concord Chemical knew or should have known of these dangers.
85. These failures to provide adequate warnings of the danger of explosion or provide adequate instructions for the use of the Maxi-Fridg R-22A refrigerant rendered it defective and unreasonably dangerous and proximately caused the injury and damages to the Plaintiffs.

WHEREFORE, the Plaintiffs pray for damages in amounts to be determined at trial:

- a. for lost earnings and capacity for future earnings;
- b. for pain and suffering;
- c. for the loss of enjoyment of life;

- d. expenses for past and future medical care;
- e. temporary and permanent physical impairment;
- f. permanent disfigurement;
- g. lost household services;
- h. property damage;
- i. costs of suit;
- j. pre-judgment and post-judgment interest; and
- k. such other and further damages as may be permitted by law;

COUNTY
NM UNFAIR TRADE PRACTICES ACT (§57-12-1, et seq.)

86. Plaintiffs incorporate by this reference the allegations contained in Paragraphs 1 through 85, above, as though fully set forth herein.

87. Defendants Aeropres, Enviro-Safe and Concord Chemical committed unfair or deceptive trade practices, as that term is defined in §57-12-2(D), NMSA, by making misrepresentations and / or omissions that did deceive and mislead Plaintiff Ken Urban.

88. Defendants Aeropres, Enviro-Safe and Concord Chemical's commission of unfair or deceptive trade practices includes the following:

- causing confusion or misunderstanding as to the source or certification of goods or services;
- representing that goods have characteristics, ingredients, uses, or benefits that they do not have;
- representing that goods are of a particular standard, quality or grade;
- using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if doing so deceives or tends to deceive.

89. Defendants Aeropres, Enviro-Safe and Concord Chemical committed unconscionable trade practices as that term is defined in §57-12-2(E), NMSA, by taking advantage of the lack of knowledge, ability, experience or capacity of Plaintiff to a grossly unfair degree with regard to an act or practice in connection with the same or offering for sale of goods.
90. Plaintiffs sustained a loss of money for which they are entitled to recover pursuant to §57-12-10(B), NMSA, as a result of Defendants Aeropres, Enviro-Safe and Concord Chemical's employment of methods, acts, or practices declared unlawful by the Unfair Practices Act.
91. Defendants Aeropres, Enviro-Safe and Concord Chemical unfair, deceptive and unconscionable trade practices were done willfully, and Plaintiffs are entitled to treble damages pursuant to §57-12-10(B), NMSA.
92. Plaintiffs are entitled to their attorneys' fees and costs in this action due to Defendants Aeropres, Enviro-Safe and Concord Chemical's violations of the Unfair Practices Act.
- WHEREFORE, the Plaintiffs pray for damages in amounts to be determined at trial for Defendants Aeropres, Enviro-Safe and Concord Chemical's violation of the Unfair Practices Act:
- a. for lost earnings and capacity for future earnings;
 - b. expenses for past and future medical care;
 - c. property damage;
 - d. attorneys' fees and costs of suit;
 - e. pre-judgment and post-judgment interest;
 - f. treble damages upon a finding of willful violation of the Unfair Trade Practices Act;
 - and
 - g. such other and further damages as may be permitted by law;

COUNT VI
LOSS OF CONSORTIUM

93. Plaintiffs incorporate by this reference the allegations contained in Paragraphs 1 through 92, above, as though fully set forth herein.

94. As a direct and proximate cause of Defendants' conduct, Janell Urban has suffered and continues to suffer significant losses including loss of consortium, companionship, guidance, and emotional and psychological injuries.

WHEREFORE, Plaintiff Janelle Urban prays for damages in an amount to be determined at trial, to compensate her for loss of consortium, companionship, guidance and emotional and psychological injuries, for costs of suit, pre-judgment and post-judgment interest, and for such and other and further relief as the Court deems just and proper.

COUNT VII
**PUNITIVE DAMAGES AGAINST AEROPRES, ENVIRO-SAFE
AND CONCORD CHEMICAL**

95. Plaintiffs incorporate by this reference the allegations contained in Paragraphs 1 through 94, above, as though fully set forth herein.

96. Defendants Aeropres, Enviro-Safe and Concord knew or should have known that the Maxi-Frig R-22A refrigerant has the flammable and explosive characteristics of propane.

97. Said Defendants knowingly and intentionally failed to warn end users of their product of those flammable and explosive characteristics, and knowingly and intentionally failed to advise end users of their products of necessary safeguards for the use of the refrigerant.

98. Defendants knowingly and intentionally failed to add the customarily used and commonly recognized scent additive, mercaptan, that is designed to alert users of a dangerous, indeed life-threatening, propane leak.

99. These Defendants failure to add a recognizable odorant to the refrigerant was an

intentional disregard of the safety of the end users of their product, especially because these defendants promoted their product for use by unlicensed, non-professionals.

100. Accordingly, Defendants Aeropres, Enviro-Safe and Concord are liable to Plaintiffs for punitive damages in an amount to be proved at trial.

WHEREFORE, Plaintiffs pray for punitive damages against Aeropres, Enviro-Safe and Concord Chemical in an amount to be determined at trial.

Respectfully submitted,

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I HEREBY CERTIFY that on July 2, 2013 I caused the foregoing pleading to be filed through Odyssey File & Serve and emailed a copy of same to the following:

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